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In The

Supreme Court of the United States

October Term, 1960

No. ~~1960~~, 144

FRANK B. SGARLAT ESTATE,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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IN THE SUPREME COURT OF THE
UNITED STATES

TERM 1950

Frank B. Sgarlat Estate,

Petitioner

vs.

Commonwealth of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Justices of Said Court:

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above case on January 18, 1950.

OPINIONS

The opinion of the Court of Common Pleas of Luzerne County, Pennsylvania is not reported. A copy of the opinion is set forth in the Appendix at p. 44 et seq. The opinion of the Supreme Court of Pennsylvania is reported in 398 Pa. 406. A copy of the opinion is set forth in the Appendix at p. 56 et seq.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 18, 1960. The petition of the petitioners for a reargument was denied by the Court on March 17, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

1. Whether a judgment, which deprives an owner of his land without compensation in a condemnation case, may be affirmed by a State Supreme Court because, on appeal, the condemner offered to pay the owner compensation.

2. Whether an owner of mineral land taken in condemnation is entitled to be paid compensation for the minerals which are required to be left in place in order to provide lateral support for the land actually taken.

3. Whether the only measure of damages which can be applied in a condemnation case is the market value of the land.

4. Whether under the factual circumstances of the instant case, the petitioners were entitled to recover their loss of profits or the royalty value of the land.

5. If the answer to the third question is yes and if the answer to the fourth question is no, whether the testimony of an owner as to the fair market value of his land was objectionable in the record of a condemnation case involving mineral land because he considered the profits that could be made out of the land in arriving at his opinion of its fair market value.

STATUTES INVOLVED

The pertinent provisions of the Act of June 25, 1948, c. 646, 62 Stat. 933 (28 U.S.C.A. 2106); of Article I, Section 10 and Article 16, Section 8 of the Constitution of Pennsylvania; of Sections 11 and 12 of the Act of 1936, Ex. Sess., Aug. 7, P. L. 106, as amended (32 Purdon's Pa. Stat. Anno. 663, 664) and of Sections 5 and 7 of the Act of 1919, July 15, P. L. 976, as amended (71 Purdon's Pa. Stat. Anno. 1575, 1577) are set forth in the Appendix at pp. 78 et seq.

STATEMENT OF THE CASE

This is a condemnation proceeding involving two tracts of land totalling 4.126 acres out of a 33.8 acre tract of sand and gravel land in the Borough of West Wyoming, Luzerne County, Pennsylvania.

West Wyoming is located 3 miles north of the Borough of Forty Fort in the Wyoming Valley, a heavily populated area in the anthracite coal regions of Pennsylvania (R. 122a).

The petitioners, and their father before them, have been engaged in the sand and gravel business in Wyoming Valley for over 50 years. Their father originally started out in business in the Borough of Luzerne in 1908. In 1928 he moved his business to Forty Fort where it is still

cated (R. 119a). He bought the West Wyoming tract for use in his Forty Fort business in 1932 (R. 63a).

Vacant land containing sand and gravel of good commercial quality is extremely scarce in the Wyoming Valley. Aside from the lands presently being used for sand and gravel purposes in this area, there is no other land available which could be used by a sand and gravel business (R. 104a, 124a, 133a, 136a).

At the same time, the reserves of sand and gravel in the area are reaching the critical stage. The petitioners themselves have only a few more years of business life left (Evidence excluded R. 125a, 126a). One former competitor has already gone out of business (R. 136a), and another is now using his deposit for his own purposes only (R. 99a). The sole remaining competitor is the Airport Sand & Gravel Co., whose plant is located on lands adjoining the instant land in West Wyoming. Because of the exhaustion of its own reserves, this company has been forced to take over land of inferior quality in order to stay in business (Evidence excluded R. 133a).

On the other hand, the instant tract is ideally suited for sand and gravel purposes. The sand and gravel is "first class material" (R. 55a). There is no overburden on the tract and the sand and gravel runs from the surface of the ground to a depth of 35 feet or 40 feet in most places. In some places it goes over 100 feet in depth (Exhs. Nos. 25, 26, R. 182a, 183a, admitted R. 112a, 113a).

The tract has been continuously used by the petitioners as a sand and gravel pit in conjunction with their washing plant in Forty Fort since 1946 (Evidence excluded R. 120a, 121a).

In 1953, the Army Engineers prepared plans to construct a levee on the parcels aforesaid as a part of a federal project to control the floods of the Susquehanna River. The project had been undertaken by the United States in cooperation with the State. The agreement provided that the Army Engineers were to design and construct the levee. The State was to provide and pay for the land (R. 56a, 57a; see also Act of 1936, Ex Sess., Aug. 7, P. L. 106, Sec. 12, 32 Purdon's Pa. Stat. Anno. 1575, Appendix p. 82).

As the first step in the acquisition of the parcels, the State caused an appraisal of the same to be made on February 28, 1954. The appraisers put a total value on both parcels of $1610.00 (Exhs. Nos. 16, 17, R. 162a, 163a. Evidence excluded R. 145a, 146a).

This appraisal, however, was based on a mistake. The appraisers did not realize that the tract contained a valuable deposit of sand and gravel, or that it was in present operation as a sand and gravel pit, and they had apparently valued the land as though it were wasteland (see their reports of appraisal, Exhs. Nos. 16, 17, supra).

The petitioners went to Harrisburg on March 28, 1955 to protest the appraisal. At this time, Dr. Goddard, the Chairman of the Water and Power Resources Board, admitted, in effect, that a mistake had been made. He acknowledged that the land should have been valued "the same as coal land in this area" (R. 129a), and he told the petitioners that he would see what he could do about it (R. 131a).

The petitioners again went to Harrisburg in July or August, 1955. On this occasion, Dr. Goddard informed them that the budget of the Board did not allow for a

increased payment for the land. He therefore advised them that there was nothing that he could do except to send the matter before a Board of View (R. 90a, 91a).

The State filed its petition for the appointment of a Board of View on January 4, 1956. The Board of View, basing its decision on the market value of the land, awarded the petitioners damages of $65000.00 (R. 16a, 18a).

At the trial on their appeal from the award, the position of the petitioners was that the land had no actual market value in the ordinary sense of the term as meaning the price which would be agreed on by a willing buyer and a willing seller.

The contended that the West Wyoming tract was to be considered as a part of their Forty Fort business, that they had what almost amounted to a monopoly on the sand and gravel business in the Wyoming Valley area, and that, since the loss of the land taken could not be replaced, they should be entitled to recover their loss of profits.

In the alternative, if the land was to be considered as an independent tract apart from the Forty Fort business, they claimed that they should at least be entitled to recover the fair royalty value of the land.

The position of the State, on the other hand, was that the tract could not be considered except as an independent tract and that the only measure of damages was the difference between the fair market value of the tract as a whole before and after the taking. Although there had been no recent sales of similar land in the area (R. 105a, 124a, 134a), the State also contended that the market value of the tract could not be proved except by the opinions of expert witnesses, and it insisted that, in arriving at their opinions,

the witnesses could not consider the profits that could be made out of the land.

These conflicting theories were presented to the trial judge at a conference held in chambers before the trial. At this conference, the trial judge ruled that the case would be tried according to the State's theory as to damages (R. 211a).

Consequently, at the trial, he advised the petitioners that "any theory or any offer that you make to show other than the fair market value will be excluded" (R. 128a). He excluded all evidence as to profits and the royalty value of the land (R. 106a., 127a. 128a, 137a).

Since the petitioners had been unable to obtain any opinion evidence of the market value of the tract, this left them at the end of their case with no evidence of the amount of their damages to be submitted to the jury.

However, when the Commonwealth indicated that it did not intend to put in any case, the petitioners recalled Harry Sgarlat, one of the owners, to testify to market value.

Mr. Sgarlat had previously testified that, for reasons already mentioned, the land had no actual market value (R. 126a, 127a), but, when he was recalled, he was asked to disregard his own personal situation (R. 138a), which meant that he was to give his opinion of the value of the land as though it were not a part of his Forty Fort business, and his opinion was therefore not based on the price for which he was willing to sell the land (R. 138a, 141a, 142a). Instead, it was based on the price which he believed a buyer would be willing to pay for the land (R. 142a).

This testimony was stricken out, on motion by the Commonwealth, because Mr. Sgarlat had considered the pool's potential of the land in arriving at his opinion (R. 144a), and this again left the record with no evidence of the amount of the damages to be submitted to the jury.

The petitioners then offered in evidence the reports of the appraisal of the land which had been made by the appraisers for the State. These were offered to show the value of the land as wasteland, but the State objected on the ground that it had offered no fair market value testimony, and it therefore claimed that the reports were immaterial. The trial judge excluded the reports (R. 145a, 146a).

As a last resort, the petitioners requested permission to call the appraisers themselves who were in the Court Room at the time. This request was denied unless they agreed to be bound by the testimony of the appraisers (R. 146a, 147a). The petitioners declined to call the appraisers without the right of cross-examination, and having no other evidence to offer, they rested.

The State also rested, without putting in any case (R. 148a). The trial judge then directed the jury to return a verdict for the State (R. 149a).

This "startling result," as it was later termed by the trial judge himself (Appendix p. 45), gave the State over four acres of valuable sand and gravel land for nothing.

It also took from the petitioners, without compensation, enormous quantity of sand and gravel, outside the lines of the parcels, which was required to be left in place in order to provide lateral support for the parcels. The

trial judge excluded all evidence which was offered to show the amount of the sand and gravel included in the support areas (R. 117a, 118a).

Judgment was entered on the verdict on April 14, 1959. The petitioners filed an appeal therefrom on April 18, 1959.

At the argument on the appeal, the State advised the Court that, no matter how the appeal might be decided, it was willing to pay the petitioners $6500.00, the amount of the award.

The State Supreme Court affirmed the judgment on January 18, 1960.

In its decision, the Court recognized the fact that the State could not take the land without compensation, but, as the petitioners understand the decision, the Court held that this objection had been removed, in the instant case because of the offer of the State to pay them $6500.00 as compensation.

The Court said:

> "The Commonwealth, properly recognizing that it may not constitutionally take land without the just compensation required by Article I, Section 10, of the State Constitution, has agreed that however this appeal is decided it will pay at least the $6500.00 set by the Board of View" (Appendix p. 58).

The Court then went on to hold that the trial judge had properly excluded the evidence which the petitioners had offered in support of their theories of damages.

did not pass upon the exclusion of the appraisal reports from the evidence or the denial of the petitioners' request to call the appraisers as on cross-examination. And it did not pass upon the question of the support (Appendix p. 65).

The petitioners filed a petition for a reargument on January 27, 1960. In their petition, they averred, generally, that the decision deprived them of their property without due process of law and without compensation in violation of their rights under the Fourteenth Amendment to the Constitution of the United States. They specifically complained that it was error for the Court to consider the offer in reaching its decision and in failing to decide the question of the support (Appendix pp. 69, 75).

This was the first time that the petitioners had pleaded the protection of the Fourteenth Amendment.

The petition for reargument was denied, without opinion, on March 17, 1960 (Appendix, p. 79).

ARGUMENT

The petitioners have divided this argument into two parts. The first part deals with questions of jurisdiction; the second with the reasons for granting the writ.

In the first part of the argument, the petitioners contend that the questions raised herein are federal questions of substance which may be reviewed by this Court; that the federal nature of the questions involved did not actually appear in the case until after the State Supreme Court had made its decision; and that the questions were therefore timely raised although not raised until the petition for reargument was filed.

In the second part of the argument, the petitioners contend that the writ should be granted because the questions raised herein involve matters of importance not only to themselves but to the public at large. In amplification of these reasons, they make the following contentions:

1. The petitioners were denied due process of law because the amount of compensation to be paid for the loss of the parcels was determined by the State Supreme Court itself and not by a jury in the case.

2. The petitioners were denied due process of law because the decision of the State Supreme Court deprives them of their property in the support without compensation.

3. The petitioners were denied due process of law because the measure of damages applied by the Court be-

low prevented them from introducing any evidence to show the amount of their damages.

Under this contention, the petitioners make the following claims in the alternative:

(a) The West Wyoming tract had no market value and the petitioners were therefore entitled to recover either their loss of profits or the royalty value of the land.

(b) If the West Wyoming tract did have a market value, the petitioners were entitled to prove this value for the lands actually taken without being required to prove the value of the entire tract before and after the taking.

(c) If the only measure of damages was the difference between the market value of the tract as a whole before and after the taking, this test was met when Harry Sgarlat was recalled to the stand and it was improper for the trial judge to strike his testimony from the record.

A. JURISDICTION

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1. Source of Federal Questions

The questions presented herein arise under the due process clause of the Fourteenth Amendment.

This clause prohibited the Court below from depriving the petitioners of their property in the parcels without a proper hearing. It also prohibited the Court below from

depriving the petitioners of their property in the support without compensation (*Chicago, Burlington & Q. R.R. Co. v. Chicago*, 166 U. S. 226, 241).

And, further, the clause prohibited the Court below from applying a measure of damages to the case which made it impossible for the petitioners to show the amount of their damages.

While this Court will not review the measure of damages applied by a State Court in every condemnation case, the situation is different where the rulings of the State Court prevent an owner from recovering any compensation. When this is the result of a case, such rulings will be reviewed by this Court. (*Chicago, Burlington & Q. R.R. Co. v. Chicago*, 166 U. S. 226, 241, supra; *Appleby v. Buffalo*, 221 U. S. 524, 532; *McGovern v. City of New York*, 229 U. S. 363, 371; *McCoy v. Union Elevated R. Co.*, 247 U. S. 354, 365; *Roberts v. City of New York*, 295 U. S. 264, 277).

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2. Timeliness of Raising Questions

(a) The question as to the power of the State Supreme Court to consider the offer in reaching its decision did not actually appear in the case until after the Court had made its decision.

The offer itself did not raise this question. In its offer, the State still contended that it had the legal power to take the land "without payment." However, it advised the Court that it was willing to pay the petitioners $6500.00 even though they should lose their appeal. The offer, therefore, was not actually intended to affect the

outcome of the case but was apparently made solely as a gesture of generosity by the State.

Consequently, since the State itself did not ask the Court to base its decision on the offer, the question which has since arisen in the case as a result of the offer was not presented to the Court by the brief or oral argument of either party.[1]

This being so, the petitioners submit that this question may now be considered by this Court.

A federal claim is timely if the act complained of is the act of the State Court itself done unexpectedly by its decision at the end of the case with no opportunity in the defeated party to anticipate the decision or to have any hearing on the ground upon which it is based. (Sees for example, *Saunders v. Shaw*, 244 U. S. 317, 320; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 320; *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673, 678; *Great Northern R. Co. v. Sunburst Oil & Ref. Co.*, 287 U. S. 358, 366; *International Steel & I. Co. v. National S. Co.*, 297 U. S. 657, 665.)

As the Court said in *Herndon v. Georgia*, 295 U. S. 441, 444:

> "There is no doubt that the federal claim was timely if the ruling of the State Court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it."

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[1] The facts relative to the offer are set forth in the petition for reargument which is attached hereto in the Appendix at p. 66. No answer was filed to the averments in the petition. They may therefore be accepted as true by this Court.

[2] *Standard Pennsylvania Practice*, Chap. 9, Secs. 40, 49.

(b) What has been said above applies with equal force to the question of the support.

The State had always denied liability for the support and it had, accordingly, restricted its offer to payment for the "parcels in issue" (Appendix p. 68). As a consequence, the decision of the Court is also restricted to payment for the parcels in issue and no compensation has been awarded to the petitioners for the loss of the support.

Assuming that the petitioners should have realized that the Court might accept the offer as a basis for its decision on the parcels themselves, they still had no reason to believe that it would fail to decide the question of the support.

(c) The federal nature of the questions on valuation was not referred to in express terms in the petition for rearguument.

These questions, however, are only an enlargement of the basic question of whether or not the petitioners were entitled to receive any compensation at all in the case, and they are so intimately connected with this fundamental question as to be an integral part thereof. In such event this Court may take cognizance of the questions. (See *Brown v. Des Moines*, 173 U. S. 193, 197, 198.)

The Court also may take cognizance of a question, although not considered by the Court below, if it is an issue of law which does not require an examination or appraisal of evidence. (*Keefe-Stewart v. Seagram*, 340 U. S. 211, 214.)

Since most of the above questions involve only the right of the petitioners to introduce evidence, it is respect-

fully submitted that they may be decided by this Court without interfering with the fact finding prerogatives of the Court below.

And finally, the entire record is before the Court on appeal. Although not considered or passed on by the Court below, this Court has the power to decide all of the questions in the case and make whatever decisions are just. 28 U. S. C. A. 2106; see also *Lawrence v. Grow*, 281 U. S. 501, 539, 559; *Stone Purchasing Co. v. Patterson Pocahontas Paper Co.*, 282 U. S. 555, 567, 568; *Continental Ill. N. B. & T. Co. v. C. B. & Q. R. R. Co.*, 294 U. S. 648, 667; *Kansas v. Colorado*, 307 U. S. 22, 31.)

Thus, if a new trial should be granted for the other errors already mentioned, it would be important for the questions on valuation to be also decided at the same time. *Cf. Ralph*, 252 U. S. 286, 290.) Otherwise, under the rule set out by the present decision of the Court below, the petitioners would still be denied just compensation for their loss.

B. REASONS FOR GRANTING THE WRIT

The petition raises serious and novel questions of great importance as to the power of a State Supreme Court to unconstitutionally affirm a judgment in favor of a condemnee in a condemnation case and as to the right of an owner of mineral land taken in condemnation to recover compensation for the loss of support. It also raises a number of problems of difficulty as to the proper measure of compensation for mineral lands in a condemnation case.

It is not believed that any of the above questions have heretofore been specifically decided by this Court. For the reasons hereinafter set forth, it is submitted that the State Supreme Court decided all of said questions in a way probably not in accord with the decisions of this Court.

I. The petitioners were denied due process of law because their compensation for the loss of the parcels was determined by the State Supreme Court on the basis of the offer of the State and not by a jury in the case.

All of the land which remains in the petitioners is on the river side of the levee (R 76a, 77a). As a result, the remainder of the tract received no benefits from the levee and the loss of the four acres was a total loss.

Under these circumstances, the petitioners submit, first, that the judgment of the trial court, which gave them nothing for their land, was unconstitutional and void. Secondly, they submit that the State Supreme Court had no power to affirm the judgment.

A. Judgment of the Trial Court

The petitioners assume here that all of their theories on damages are wrong and that the theories of the State on damages are correct. Nevertheless, they contend that it was still error for the trial judge to direct the jury to return a verdict for the State.

(a) It is conceded that the burden is usually on the owner to prove the amount of his damages in a condem-

nation cases (*Nichols on Eminent Domain*, 3rd Ed., Vol. 5, Sec. 18.51). If the owner brings the suit and he is unable to prove that he has suffered any damage, it is clear that he is not entitled to a verdict.

However, there is a distinction to be drawn between the *fact* of damage and the *amount* of damage.

Consequently, if the suit is brought by the State, which thereby admits the fact of damage, but the owner is unable to prove the amount of damage, it is submitted that the burden must then shift to the State to prove the value of the land. The State can hardly complain if it is required to prove an offer what it itself says his land is worth, and otherwise it takes his land without compensation in violation of the owner's constitutional rights.

The State, however, had no right to refuse to put in its own evidence of value in the instant case. The petitioners contend that it was either required to abandon the taking or else pay them the value which its own appraisers had put on the land.

(2) Under the particular statute applicable to this case, the State is required to make an appraisal of land and to tender the appraised value to the owner even before it takes over the land. The owner may accept the tender without prejudice to his right to apply for a Board of View. (See Section 11 of the Act of 1936 and Section 7 of the Act of 1949, Appendix pp. 80-82, 83.)

It thus appears that the petitioners had the right to receive $161,000 in this case even without a trial. Since no tender of this amount was ever made (R. 130a), they must have also had the right to receive at least this amount as a result of the trial.

The trial judge therefore erred in refusing to admit the appraisal reports in evidence. He also erred, the petitioners contend, in refusing to permit them to call the appraisers as on cross-examination. If the petitioners had a statutory right to receive the appraised value from the State, they necessarily had the right to call the appraisers and to cross-examine them in order to determine whether or not they had properly appraised the land.

(c) If nothing more, the petitioners were entitled to receive a verdict for nominal damages (*United States v. Mack*, 149 U. S. 273, 277, *Standard Pennsylvania Practice*, Vol. 6, Chap. 25, Sec. 27).

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2. *Affirmance of the Judgment.*

If the judgment of the State Supreme Court is construed as an unconditional affirmance of the judgment of the trial court, it is submitted that it is clearly erroneous. On the other hand, if it is construed as awarding the petitioners the sum of $6500.00, the petitioners contend that it is erroneous for the following reasons:

1. The offer of $6500.00 was not a part of the record in the case.

No litigant could ever feel secure in the protection of the law if his vested rights in a new trial could be determined in this manner. Any appellee condemnee, for example, who conceded error in the Court below and who feared a new trial, could avoid the trial by simply making an offer of settlement on the appeal. Such an offer would not usually contain his own terms for a settlement. If approved by the Court, as it was in this case, it would give the condemnee

not himself the right to fix the amount of compensation to be paid.

2. The amount of the award does not represent just compensation. Assuming arguendo that the award was not based on error or caprice, the Board still did not have before it the same evidence, or quality of evidence, as was offered at the trial; and it did not have the benefit of any corrected appraisal by the State.

Moreover, the award itself could not have been admitted in evidence at the trial (*Berger v. Public Prof. Auth.*, 380 Pa. 19, 109 A. 2d 709, 712). Consequently, the State Supreme Court not only based its decision on the award which in itself was inadmissible as evidence in the case but it, in effect, deprived the petitioners of their statutory right to take an appeal to a jury from the award. (See Section 5 of the Act of 1949, *supra*, Appendix pp. 82-83.)

3. Under the laws of Pennsylvania, the petitioners were entitled to a jury trial. The Act of 1936, which confers the power of eminent domain on the Water and Power Resources Board, provides that the proceedings for condemnation shall be in accordance with the Act of 1929 (Act of 1936, Section 11, Appendix pp. 80-82). The Act of 1949, *supra*, provides that on appeal from the award of a Board of View, an issue shall be framed as "in proceedings in eminent domain by municipalities" (Section 5, Appendix pp. 82-83). In proceedings in eminent domain by municipalities a property owner has the right, under the Constitution of the State, to have the amount of his damages determined by a jury (Article 16, Section 8, Appendix p. 80).

In the instant case, however, the amount of compensation to be paid to the petitioners was not determined by a

jury. Instead, it was fixed by the Supreme Court of the State. The Court fixed the compensation by a capitalization offer of the State which was based on the amount of the award.

In doing this, the petitioners submit that the Court not only acknowledged that the original judgment was erroneous but it substituted its own opinion, or that of the Board of View, for the verdict of a jury in the case, and in this way deprived the petitioners of their constitutional right to a trial by jury (*Dimick v. Schiedt*, 293 U. S. 474, 485; *Raymond T. J. Riling, Inc. v. Schuck*, 346 Pa. 169, 29 A. 2d 693, 694).

In the Dimick case, which the petitioners believe conclusive on the point at issue here, this Court held that a State Court had no power to avoid granting a new trial in a trespass case by increasing the amount of a verdict.

A fortiori, it seems to the petitioners that a State Court has no power to avoid granting a new trial in a condemnation case by awarding compensation to an owner when he has received no verdict.

II. The petitioners were denied due process of law because the decision of the State Supreme Court deprives them of their property in the support without compensation.

If the petitioners should carry their excavation up to the lines of the parcels, the parcels themselves, together with the levee constructed thereon, would slough off and fall down into the pit (R. 68a).

The petitioners, of course, would never be permitted to take such drastic action. (See *Commonwealth v. Barber Bros.*, 340 Pa. 353, 165 At. 396, 397.) If the State itself did not prevent them from doing this, the United States surely would.

Hence, the petitioners are required to leave sufficient sand and gravel in place to provide proper natural support for the parcels. They will not be able to excavate any sand and gravel which lies within an angle of repose of one on three from the property lines of the parcels. (Exh. No. 9, R. 137a, and not excluded R. 69a, 70a.)

In addition, the Army Engineers will not permit them to conduct any excavation within 100 feet of the toe of the bank (evidence excluded R. 57a et seq.). Since the toe of the bank on one of the parcels is only a few feet distant from the river line of the parcel (see Exh. No. 25, R. 182a, admitted R. 112a), this means that the petitioners lose the approximately another 100 feet of land.

Thus, the actual amount of sand and gravel lost to the [illegible] amount to more than the parcels are worth. There are only 175,000 tons of sand and gravel under the parcels themselves (R. 113a), but, if the above support is included in the computation, the petitioners are losing a minimum of 500,000 tons (evidence excluded R. 117a, 118a).

Nevertheless, at the trial, the State took the position that it was entitled to have the benefit of the above support [illegible] to pay compensation therefor.

Its theory, apparently, was based on the premise that it was in the same position as any other landowner. Since every landowner automatically acquires the right of sup-

part as a necessary incident to his land, the State contends that it also had the same right as regards the instant land (see R. 61a, 70a).

The ordinary landowner, however, never acquires the right of support for nothing. The price which he pays for the land would not be the same if the right of support did not go with the land and, if the support itself had any intrinsic value to the seller, this value would naturally be included in the price which he would ask for the land.

So, if a private landowner, after bargaining for it with his seller, must pay for the right of support, petitioners contend that the State also must pay for the same right of support when it takes the land by condemnation (*Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393).

This is unquestionably the law in Pennsylvania and is binding on the State in the instant case.

It has been repeatedly held by the Courts of Pennsylvania that an owner of mineral land must be compensated for the loss of all of the minerals which are required to be left in place in order to provide proper vertical and lateral support for the surface of the land actually taken. See, for example, *Penna. Gas & Coal Co. v. Versailles Land Co.*, 131 Pa. 522, 19 At. 333; *Dilts v. Penna. R. R. Co.*, 235 Pa. 516, 71 At. 1072, 1076, 1077; *In Re Glen Alden Coal Co.*, 350 Pa. 177, 38 A. 2d 37, 39 [illegible]

III. The petitioners were denied due process of law because the measure of damages applied by the Court below prevented them from introducing any evidence to show the amount of their damages.

As stated in the preceding section, the petitioners have lost a minimum of 500,000 tons of sand and gravel.

This tonnage would sell on the market for more than $500,000.00. On the basis of a royalty rate of .10 per ton, it is worth $50,000.00. The profits that could be made out the tonnage come to almost $200,000.00 (evidence excluded R. 124a, 127a, 128a, 137a).

Despite these facts, the appraisers for the State found that the land had a market value of only $1610.00 (Exhs. Nos. 16, 17, R. 162a, 163a, evidence excluded R. 145a, 146a). The Board of View found that it had a market value of only $6000.00 (R. 18a).

[illegible]

The petitioners are entitled to receive "just compensation" for the loss of their land (Pa. Const., Art. 1, Section 10, Appendix p. 8a).

Such compensation "means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his land had not been taken" (*United States v. Miller*, 317 U. S. 369, 373; see also *Orgel on Valuation*

Under Eminent Domain, 2d Ed., Vol. I, Sec. 46; *Nichols*, supra, Vol. IV, Sec. 12.1 (4)).

In the ordinary case, if an owner recovers the market value of his land, he is restored to the same pecuniary position as he formerly occupied and he should not be entitled to receive anything more. At the same time, the condemner ought not to be allowed to take his land and pay him anything less.

Market value, then, is used as the test of the damages in the ordinary case only because it is the best means by which the end of just compensation can be attained and because, in almost every case, it is the actual equivalent of just compensation.

However, market value and just compensation are not always the same thing.

If an unusual case should arise where the market value of the land does not equal just compensation, the Court will apply some other measure of recovery to the case and, of course, if the land has no actual market value, it is self-evident that some other measure of recovery must be applied.

> "The Court, in an endeavor to find working rules that will do substantial justice has adopted practical standards, including that of market value. United States v. Miller, 317 U. S. 369, 374, 63 S. Ct. 276, 280, 87 L. Ed. 336, 147 A. L. R. 55. But it has refused to make a fetish even of market value, since it may not be the best measure of value in some cases."
>
> (*United States v. Cors*, 337 U. S. 325, 332.)

Argument

"But where property is of a kind seldom exchanged, it has no market price, and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights."

(*Kimball Laundry Co. v. United States*, 338 U. S. 1, 6.)

"Fair market value has normally been accepted as a just compensation. But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and supplied other standards."

(*United States v. Commodities Trading Corp.*, 339 U. S. 121, 123.)

See also *United States v. General Motors Corp.*, 323 U. S. 373, 379; *United States v. Toronto, Hamilton & Byrtale Nav. Co.*, 338 U. S. 396; *Orgel*, supra, Vol. I, Sec. 18.

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2. *The West Wyoming tract has no actual market value.*

Market value is the price which would be agreed upon by a willing buyer and a willing seller (*Nichols*, supra, Vol. IV, Sec. 12.2 (1)).

It is not the buyer's price alone nor is it the seller's price alone, but it is a hypothetical price which would be agreed upon by both parties. Both the buyer *and* the seller must agree on the price before there can be a sale.

Consequently, the question of whether or not land has a market value would appear to be a question of fact which ought to be submitted to the jury in a condemnation case.

In the instant case, however, this question of fact was decided adversely to the petitioners by the trial judge himself even before the trial began and without hearing any of the evidence on which they based their claims. Before the trial began, the trial judge decided that the measure of damages would be based on the market value of the land, and he therefore refused to permit the petitioners to introduce any evidence which would show that it had no market value (R. 211a; see also R. 128a).

And, although the petitioners had been prevented from introducing evidence to show that the contrary was true, the State Supreme Court also apparently found that the West Wyoming tract had a market value.

Notwithstanding these findings by the Courts below and assuming that said Courts had the power to make the findings, this Court may make its own independent examination of the record in the case in order to determine whether or not such findings were correct. (*Napue v. Illinois*, 360 U. S. 264, 271).

On the basis of the facts which are hereinafter set forth, it is respectfully submitted that it would be impossible for the West Wyoming tract to have any actual market value in the sense of this term as it is legally employed.

(a) Aside from the lands which are now in use as sand and gravel pits in the Wyoming Valley area, there is no other land available in the area which could be used for this purpose.

This extraordinary fact, which, in the opinion of the petitioners, is the most important fact in the case, was not denied by the State at the trial, but, in its brief to the State Supreme Court, the State referred to a U. S. Bureau of

Mines Bulletin which showed that there was a thick continuous blanket of sand and gravel under the Wyoming Valley. The State then asserted that there must be an abundance of sand and gravel land readily available for excavation in the Valley.

However, as was stated in the Statement of the Case, the Wyoming Valley is a heavily populated area in the anthracite coal regions of Pennsylvania. A large part of the deposit aforesaid is contaminated with carbon and other deleterious substances which make it unfit for commercial purposes, and there is only a small part of the surface over the deposit which is not occupied by cities, boroughs and other municipalities.

As a consequence, the State has never been able to point to any particular tract which would substantiate the claim which it made on the appeal that there was other land readily available for excavation in the valley.

On the other hand, at the trial, four witnesses with a total of almost 100 years experience with sand and gravel conditions in the Valley testified, without contradiction, that there was no such land (R. 104a, 124a, 133a, 136a).

(b) The petitioners can sell all of the sand and gravel that they can produce (R. 122a, 136a). Their only present competitor is the Airport Sand & Gravel Co.

If they were to sell their West Wyoming tract, they would not only be depriving themselves of the profits which they could make out of the tract, but they would be setting up an additional competitor in business against themselves.

At the same time, they would be depriving themselves of the major portion of their reserves. The only tract left would be the Forty Foot tract, and this tract now has a life of only 3 or 4 years. In 1955, it had a life of only 8 or 12 years (evidence excluded R. 125a, 126a).

Under these unusual circumstances, it could hardly be expected that the petitioners would be willing to sell the West Wyoming tract for anything less than what it was reasonably worth to them, but no purchaser would be willing to pay this price. It requires a considerable investment to plant and equipment to operate a sand and gravel business (evidence excluded R. 106a), and, if a purchaser wished to make a fair profit out of the tract himself, he would have to keep his land costs as low as possible.

The petitioners therefore respectfully submit that it is apparent from the facts themselves that no price could be agreed upon which would be mutually satisfactory to both parties. The petitioners would never be willing to accept the price which any purchaser could afford to pay for the land and no purchaser would be willing to pay the price which they would justifiably ask for the land.

(c) There have been no recent sales of similar property by which the market value of the West Wyoming tract could be ascertained.

The only sales of sand and gravel land of good quality which have ever been made for a sand and gravel business in the past were those which were made several years ago to the father of the petitioners and the Airport Sand & Gravel Co. There have never been any sales made for a sand and gravel business (R. 105a, 124a, 134a).

Argument

At the trial, reference was made to two sales of land which had been made to competitors of the petitioners.

One of these was a sale made to the Airport Sand & Gravel Co. after the instant action had been instituted. This transaction, however, involved sand and gravel land of inferior quality which was bought by the Airport Co. only because of the exhaustion of its own reserves (evidence excluded R. 135a).

The other was a sale of stone land made to Mr. Banks several years ago (R. 105a, 106a). Since no suggestion was made at the trial that this was a comparable sale, the petitioners were given no opportunity to show that it was also a forced sale.

The petitioners respectfully submit that neither of the above transactions could properly be used as a basis for determining the market value of the instant land.

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3. *The petitioners are entitled to recover on the basis of the worth of the land to them.*

If the West Wyoming tract has no market value, the only bases for recovery left are the worth of the land to the State or its worth to the petitioners.

The worth of the land to the condemnor is rarely, if ever, used as the standard of compensation in a condemnation case. The worth of the land to the owner is the standard of compensation which is generally used (*Orgel*, supra, Vol. I, Sec. 39, 81; *Nichols*, supra, Vol. IV, Sec. 12.21, 12.22).

(a) The rights of the petitioners in the instant case are somewhat broader than those of the owner in the [illegible] case.

Under the Act of 1936, which controls this case, an owner has the right to recover damages for property "injured or destroyed" as well as for that which is "taken" by the State. (Act of 1936, supra, Sec. 11, Appendix [illegible] 80 S.Ct.)

The State, consequently, has surrendered its immunity to suit for other than direct damages and it has given its express consent to be held liable for consequential damages. It has, accordingly, abandoned any right that it might have had to claim that the damages should be restricted to the value of its own use of the land.

By its adoption of the above Act, the petitioners contend that the legislature clearly indicated its intention that they were to be indemnified in full for their loss.

(b) The petitioners enjoy what almost amounts to a monopoly on the sand and gravel business in the Wyoming Valley area. Where property has monopolistic characteristics, it can have no market value and the owner is entitled to recover on the basis of the worth of the property to him (*Montgomery County v. Schuylkill Bridge*, 140 Pa. 54, 20 At. 407, 408).

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4. *The West Wyoming tract is to be considered as [illegible] of the Forty Fort business.*

The value of the West Wyoming tract to the petitioners rests primarily on the fact that it is an integral part

their business in Forty Fort. It has been inseparably connected in use with the Forty Fort tract since 1946 (evidence excluded R. 120a, 121a).

If two tracts of land are inseparably connected in use, the injury to one necessarily results in injury to the entire enterprise, and both tracts are to be considered as one unit in a condemnation case even though they might not be contiguous lands (*Morris v. Commonwealth*, 367 Pa. 410, 80 A. 2d 762, 764; *Barker v. United States*, 143 F. 2d 391, 394, 395, certiorari denied 323 U. S. 772; *United States v. Wyandes*, 202 F. 2d 550, 554; *City of Stockton v. Mills and Sons, Inc.*, 165 F. Supp. 554; see also *United States v. Powelson*, 319 U. S. 266, 275, 276; *McCandless v. United States*, 298 U. S. 342, 345, Ann. 6 A. L. R. 2d 1107, 1230).

The petitioners are entitled to recover their loss of profits.

The claim of the petitioners for profits is based primarily on three facts, viz. (1) they were actually operating the West Wyoming tract as a part of their Forty Fort business at the time of the taking; (2) they have only a few more years of business life left; and (3) they have no means of replacing the land taken.

In view of these facts, it seems clear to them that there is no other way by which they can be fully indemnified for their loss unless they recover their loss of profits.

The petitioners concede the general rule that profits are not recoverable in a condemnation case involving mineral land. (Ann. 156 A. L. R. 1426; *Orgel*, supra, Vol. 1, Sec. 165; *Nichols*, supra, Vol. 4, Sec. 13.22.)

The primary reason for this rule, however, is that, in the ordinary case, the market value of the land can be shown. The petitioners have been unable to find any case decided under the rule where it was proved as a fact that the land involved had no market value.

Another reason given for the rule is that, in the ordinary case, the profits claimed are too speculative to be recovered.

Thus, in the usual case involving a subterranean mineral, neither its quality nor quantity can be determined with any reasonable degree of certainty.

The risks and hazards to be encountered in converting the mineral into a marketable commodity necessarily introduce a speculative factor into the profits to be made. And, if the land has never been operated as a mine, the prices and costs of production at the time when it might be mined are unknown and it is impossible to tell what the profits would be.

But, in the instant case, the quality and the quantity of the sand and gravel can be definitely ascertained. (See R. 55a, Exhs. Nos. 25, 26, R. 182a, 183a, admitted R. 112a-113a).

It needs only a shovel to remove the material from the ground and there are no extreme risks or hazards to be met in excavating them from the tract and hauling them to the washing plant in Forty Fort for processing.

Moreover, because of the fact that the entire tract itself will be completely excavated in the not too distant future (evidence excluded R. 135a), it is certain that the land involved here would have also been excavated with

reasonably short period of time after the taking occurred. Since the demand for the materials in the area is so great, it is also certain that the petitioners could have made the same profits out of this land as they had made out of other parts of the tract in the past.

Finally, the profits that were made in the past can be shown on a basis that is the absolute minimum.

The petitioners cannot show the exact profits which were made because their books carried no allocation of income and expenses as between the two tracts but, by assuming that rented equipment was used for the work, they can show the maximum costs, direct and indirect, which could have been involved in excavating the sand and gravel from the West Wyoming tract and hauling it to the plant in Forty Fort for processing. They can also show the maximum costs, direct and indirect, which could have been incurred in processing the materials through the plant in Forty Fort. By adding the two together and subtracting the total from the market prices existing at the time, the profits which would be thus proved would be considerably less than those which were actually made by the petitioners (evidence excluded R. 127a, 128a, 157a).

It has been repeatedly held in various types of cases that prospective costs are recoverable, if they can be proved with a reasonable degree of certainty. Absolute certainty of proof is never required. (See, for example, *Getz v. Deed*, 377 Pa. 480, 105 A. 2d 102, 104, 105; *Massachusetts Bonding & Ins. Co. v. Johnston & Harder, Inc.*, 343 Pa. 270, 22 A. 2d 709, 713, 714.)

Also, in *Lehigh Coal Co. v. Ulp*, Wilkes-Barre and Eastern Railroad Co., 187 Pa. 145, 41 At. 37, a culm bank

was taken by the railroad company under its power of eminent domain. It may be assumed that in 1898, when the case was decided, there was no market for culm banks in that vicinity. The Court held that the owner was entitled to recover the profits that he could have made out of the coal in the culm bank.

Profits were also allowed in the following trespass and ejectment cases where it was found that the coal involved had no market value (*Coleman's Appeal*, 62 Pa. 252, 279; *Eaton v. Kolb*, 84 Pa. 253, 240; *Oil Refining Co. v. Rogers*, 108 Pa. 147, 152; *Symmes v. Barbour Land & M. Co.*, 99 Pa. Superior Ct. 526, 531). The measure of damages in these cases was the same as in the present case, to wit, the value of the coal in place. (See *Ellwood Power Co.*, 216 Pa. 283, 65 At. 673.)

And, in *Stanton v. Valley Soap Co.*, 151 Pa. 46, 25 At. 96, a recovery of profits was allowed. In that case, the plaintiff's ice crop was destroyed when the defendant's vats broke and the water below the ice. The measure of damages here was also the same as in a detention case, to wit, compensation for the loss. It was held that the ice crop, as such, had no market value, but that the plaintiff was entitled to recover the profits.

While most of the above cases can be distinguished from the instant case on the ground that a severance of the mineral had occurred, this seems to the petitioner to be a distinction that is more apparent than real. In each case the measure of damages which was applied was, in all of the cases, the value of the mineral in place. If an owner of mineral land is deprived of the use of his mineral, his damages are the same no matter how the loss occurred and irrespective of whether or not the mineral is removed from the ground.

Argument

The question in the instant case, then, is again simply a question of whether or not the West Wyoming tract had a market value. If it did not, the petitioners respectfully submit that, under the applicable law of Pennsylvania, they are entitled to recover their loss of profits.

b. The petitioners are entitled to recover the market value of the land.

It is assumed here that the West Wyoming tract is to be considered as though it were an independent tract of land which was owned by someone else.

As so considered, the tract would still be a unique situation. Since there have been no recent sales of similar properties in the area, the market value of the tract could still not be proved.

Nevertheless, although the market value of the tract could not be proved, the royalty value of the sand and gravel that was in the tract could be proved very easily.

Sand and gravel from the Wyoming Valley area has been sold on a royalty basis on numerous occasions in the past. The minimum royalty ever paid was .10 per ton (see exhibit R-10(a), 125a).

It is not believed that even the State will deny that any owner of the West Wyoming tract could obtain a royalty of at least this amount at any time. Because of the favorable location of the tract, and the fact that it has not been worked, the petitioners were prepared to prove that, under present market conditions, it could command a royalty of at least .20 per ton.

(a) A royalty represents the buyer's price for a mineral. In this sense of the term, it is the equivalent of the fair market value of the mineral in place.

Hence, if the marked value of mineral land as such cannot be shown and if the owner cannot make a claim for loss of profits because he could never mine the land, it has frequently been held in trespass actions in Pennsylvania that the owner may recover the royalty value of the minerals which he has lost.

Thus, in *Stark v. Penney Coal Co.*, 241 Pa. 597, 88 At. 770, 771, 772, a mine operator invaded the coal underlying land which was too small to be operated as a mine. Although the coal had no value to the owner, except as a means of support for the surface of his land, it was held that he could recover the royalty value of the coal. See also *Trustees of Kingston v. L. I. C. Co.*, No. 1, 243 Pa. 169, 88 At. 868, 870, 871; *Trustees of Kingston v. L. I. C. Co.*, No. 2, 241 Pa. 481, 88 At. 768, 769.

(b) It has also been held in Pennsylvania that the royalty basis for recovery is to be taken as supplanting the ordinary measure of recovery in a trespass case where it can be proved that there is a demand, or a market, for the mineral on the basis of royalty. *Lehigh v. Bowman*, 307 Pa. 161, At. 332, 333(1).

In such cases, as has been said before, the royalty value becomes the equivalent of the market price of the mineral in place.

Whenever the market price for property taken in eminent domain can be proved, the owner is always entitled to recover this price. *United States v. New River Co.*, [illegible]

Co., 262 U. S. 341, 345, 346; see also *Campbell v. United States*, 262 U. S. 337, 340; *United States v. Commodities Trading Corp.*, 339 U. S. 121).

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5. The Before and After Rule has no application to the facts of the instant case.

If, despite the above contentions, it is to be held that market value is the only measure of damages in this case, the petitioners claim that they should have been allowed to limit their proof to the market value of the land which was actually taken.

The Court below held, however, that the petitioners could not do this (see R. 148a). It ruled that the only way that the petitioners could prove their damages was to have their witnesses testify to the fair market value of the tract as a whole before and after the taking (Appendix p. 30).

(a) There are two reasons why the Before and After Rule is applied to a partial taking. The condemnee is entitled to have the advantage of any benefits which the taking may bring to the remainder of the tract. The owner is entitled to be compensated for any damages which the taking inflicts on the remainder of the tract.

In the instant case, however, there are no benefits OR damages, and the petitioners do not want or claim any damages to the remainder of the tract. They therefore had the right to waive the application of this rule (*Hollis v. Conn.*, 131 Conn. 525, 41 A. 2d 93, 95).

(b) The petitioners further submit that the Before and After Rule should never be applied to a case involving a partial taking of mineral land.

For a witness to testify to the market value of an entire tract of mineral land would require knowledge on his part of the quality and the quantity of the mineral in the whole tract. This could be a prohibitively expensive proposition for the owner and, in the opinion of the petitioners, it would be highly inequitable to require him to go to such proof when only a small part of the tract is taken and the remainder is not in issue.

This is particularly true when it is considered that mineral lands are generally sold, not on a tract basis, but on either an acreage or a tonnage basis (*Seabright v. Bealman*, 307 Pa. 301, 161 At. 332, 333; *Lehigh Valley Coal Company v. Luzerne County*, 255 Pa. 17, 99 At. 223, 224).

If mineral land has a market value on either the acreage or the tonnage basis, the owner in a condemnation case should have the right to recover on the same basis.

(c) The acreage basis is an inappropriate measure of damages when only a few acres out of a tract are taken and there are complicated problems of support involved.

The quantity of a mineral, to say nothing of its quality, may vary greatly as between different acres. One acre may not have the same quality or quantity of the mineral as another.

Again, the concept of a surface acre does not permit any allowance to be made for the loss of tonnage due to lateral support. Where problems of support are involved it is impossible to tell how many surface acres there are

Argument

in the support and the only way that the quantity of the loss can be determined is by using the tonnage basis.

(d) The petitioners are aware of the general rule that an owner of mineral land may not estimate the number of tons of the mineral taken and then multiply this tonnage by an estimated value per ton in order to arrive at his damages.

However, there is an exception to this rule when the case does not involve fanciful claims on the part of the owner. If neither the quality nor the quantity of the mineral is in doubt, and if it has a market value on the tonnage basis, it is only logical to multiply the tonnage by the value per ton in order to arrive at the amount of the loss.

This exception has been recognized by both the administrative officials and the Courts of Pennsylvania.

If coal lands are taken for highway purposes in Pennsylvania and there are problems of support involved, the usual and customary method of evaluating the damages is the tonnage basis. (See *Kerr v. Commonwealth*, 381 Pa. 242, 113 A. 2d 254, 256; *Union Collieries Company Appeal*, 345 Pa. 531, 29 A. 2d 26, 27.) See also *National Brick Co. v. United States*, 131 F. 2d 30, 31; *Cade v. United States*, 213 F. 2d 138.

(e) For the foregoing reasons, the petitioners contend that if their theories of damages were not correct, that of the State was also incorrect.

Since the theory of the State was adopted by the Court below, it follows that the decision is based on an erroneous theory of damages and the petitioners should therefore be granted a new trial.

8. *The testimony of Harry Sgarlat was improperly stricken from the record.*

As a final contention, the petitioners submit that even if the only measure of damages was the difference between the market value of the tract before and after the taking, it was still improper for the trial judge to strike Harry Sgarlat's testimony from the record.

Mr. Sgarlat had given his opinion of the fair market value of the tract before and after the taking.

His opinion was not based solely on profits so as to be the equivalent of a claim for profits, as the State contends. It was not even based on the price for which he would be willing to sell the tract. Instead, it was based on the price which Mr. Sgarlat believed a buyer would pay for the tract (R. 138a, 141a, 142a, 143a).

(a) The only reason why anyone would buy the West Wyoming tract would be to operate it as a sand and gravel pit and make a profit out of it. Consequently, the profit potential of the tract is the most important factor, if not the only factor, which would be considered by a buyer in determining the price which he would pay for the tract.

Where there have been no recent sales of similar land in the area, it is proper for a witness to consider all of the characteristics of mineral land, including its profit potential, in arriving at his opinion of its market value. *Lehigh Navigation Coal Co.'s Appeal*, 327 Pa. 327, 193 A. 50, 53; *Philadelphia & Reading Coal & Iron Co. v. Commissioners of Northumberland County*, 323 Pa. 185, 186 A. 105, 108; see also *Denver v. Quick*, 108 Colo. 1111, 113 P.

24 399, 134 A. L. R. 1120; *State v. Mattman Mercantile Co.*, 321 P. 2d 912, 51 Wash. 2d 711).

(5) Harry Szarlat was one of the owners of the land. An owner, by the mere fact of being an owner, is placed in a special position by the law. He is not held to the same standards of qualification as other witnesses, and although he may be otherwise incompetent, he may always testify to the value of his own land (*Belknap v. Bethlehem Water Auth.*, 364 Pa. 408, 72 A. 2d 264, 267).

The owner, of course, may be cross-examined by the condemner, and his testimony must be submitted to the jury under proper instructions from the Court, but, the petitioners submit, it cannot be stricken from the record.

Otherwise, the owner's declared competence as a witness would be destroyed, and, in an unusual case like the instant one, where he may have no other evidence of market value, he might never be able to recover just compensation for the loss of his land.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

James Lenahan Brown,
Miners National Bank Building,
Wilkes-Barre, Pennsylvania,
Counsel for Petitioners.

May 1960

Neville B. Shea,
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Of Counsel for Petitioners.

APPENDIX

I.

OPINION OF THE COUNTY COURT

IN THE COURT OF COMMON PLEAS OF
LUZERNE COUNTY

No. 725 January Term, 1956

FRANK B. SCARLAT ESTATE

v.

COMMONWEALTH OF PENNSYLVANIA

DECISION

BEFORE: HONORABLE P. J. FLANNERY, LEWIS, LYNOTT AND BROMINSKI, JJ.

This is an appeal from the award of a Board of V[illegible] in eminent domain proceedings instituted by the Commonwealth to fix the compensation for land owned by the plaintiffs in the Borough of West Wyoming and taken by the Department of Forests and Waters in the construc[illegible]

of a like. The board made an award in favor of the plaintiffs. They not being satisfied with the amount appealed to the court. At the close of the plaintiffs' case, the Commonwealth having offered no testimony, the trial Judge directed a verdict for the defendant. This startling result came about by reason of the fact that the plaintiffs and the defendant had different theories of the manner of fixing damages.

It was the plaintiffs' contention that the land taken for the dike contained a valuable deposit of sand and gravel and that they were entitled to be compensated therefor, separate and apart from the value of the surface taken. The Commonwealth contended, however, that it was liable to pay for the difference between the fair market value of the whole tract before and after the taking, giving effect to the taking and also giving consideration to the fact that there was a deposit of sand and gravel on the land.

The plaintiffs offered no competent evidence of damages if the defendant's theory of damages is correct. In fact, at the close of the testimony, that was conceded by plaintiffs' attorney. He said:

"Mr. Neville Shea: Now, if the Court please, our case is finished but I see that the three real estate experts for the Commonwealth and their sand and gravel expert who appeared before the Board of View are present in the Court Room and *inasmuch as we have no testimony of value to go to the jury* I would like to request permission to call the state's witnesses to testify to value." (Underscoring ours.)

With the record in that state, there was no alternative open to the trial Judge. He was compelled to grant the

defendant's motion for a directed verdict, although the motion was directed to the [illegible]
but the land taken.

The first and main [illegible] theory of damages [illegible] the proper one to be applied. [illegible] hundred years ago the [illegible] case of Searle v. Lackawanna and Bloomsburg R. R. Co., 33 Pa. St. 57, which was [illegible] from this county. In that case the plaintiff owned a [illegible] land which was [illegible]. He claimed that, because of the construction of the railroad, he was [illegible] deprived of the right to [illegible] and that [illegible] had been injured on the [illegible]. The [illegible] rule for measuring [illegible] in such a case [illegible]

"When the whole [illegible] is taken, no [illegible] remains, or [illegible] is left [illegible] the [illegible] of that [illegible] [illegible] in order to avoid the [illegible] of [illegible] would [illegible] and other [illegible] [illegible] the property [illegible] to [illegible] [illegible] [illegible]

years. The plaintiffs sought to place a separate value on the limestone and the lower Court permitted them to do so. The Supreme Court held that this was erroneous and reversed a judgment for the plaintiffs.

To the same effect, although not involving mineral rights, are Greenfield v. Philadelphia, 282 Pa. 344; Kleppner v. Pittsburgh, Bessemer and Lake Erie R. R. Co., 247 Pa. 605; Westinghouse Air Brake Co. v. Pittsburgh, 316 Pa. 272; McSorley v. Avalon Borough School District, 291 Pa. 252.

A very enlightening and well-written article on this subject is to be found in 7 Hastings Law Journal 163 (February, 1956). The author of that article, after reviewing and citing cases from several states, including Reading & Pottsville R. R. Co. v. Bachman, *supra*, states his conclusions as follows, page 165:

> "The mining engineer is faced with a somewhat different problem when he seeks to place a market value upon lands which contain valuable mineral deposits but which have not been heretofore explored or worked. When such a property is taken in condemnation and contains valuable deposits the existence of the geological features can be taken into account so far as they affect the market value of the land, but in such instances the mineral deposits cannot be separately segregated and valued independently of the land of which they are a part. The deposits cannot be considered as so much potential merchandise to be valued assumed. The land must be valued as land with the presence of the mineral deposits being given proper consideration. *The question inquires not what* [illegible]

would purchase in the market would pay for the land having knowledge of the existence of these valuable deposits which are component parts of the land itself." (Underscoring Italics Ours.)

The Supreme Court of New Jersey, in a very similar case to this (Ross v. Commissioners of Palisades Interstate Park, 90 N. J. L. 461, 101 Atl. 630) adopted the same principle of law, citing Reading & Pottsville R. R. Co. v. Balthaser, supra. It was there said, 101 Atl., at page 631:

"* * * Nor was it error to exclude evidence as to the value of the stone in place, under the case of Manati v. Delaware, etc. R. R. Co., 89 N. J. Law 327, 98 Atl. 467. *The stone in place is a part of the land.* To what extent, if any, the value of the land is enhanced by the stone may be shown. The value of the land as stone land suitable for quarrying is a proper subject of consideration both by the witnesses and the jury in fixing the amount of just compensation to be awarded, *but not the value of the stone separable and apart from the land.* The value of the land is not measured by such facts. The stone is a component part of the land." (Underscoring Italics Ours.)

Substantially the same idea is expressed in 4 Nichols Eminent Domain, 13-22 21, citing and quoting from Lackawanna & Bloomsburg R. R. Co., supra.

The plaintiffs contend that they can recover either the value of the sand and gravel in place, the profits to be obtained by removal of the sand and gravel or the royalty value of said minerals. In support of their theory, the plaintiffs cite a number of cases, all of which are readily distinguishable from the case at bar.

Lehigh Coal Company v. Wilkes Barre & Eastern R. R. Co., 187 Pa. 145 involved the taking of a culm bank which is coal and refuse removed from the ground, and therefore personal property. This distinction is recognized by the Supreme Court, where it is said, page 150:

> "The market value of anything is what the owner can get for it, less the cost of marketing it. This is the general rule, applicable as the measure of damages where the object is to secure compensation only, and *such as to personalty*. The cases of property which is part of the realty, but the value of which depends on the conversion into personalty, such as coal, ore, etc., or a sand and gravel bed, have [illegible] and exceptional rule of their own, because the expense and risk in the conversion of the material [illegible] to measure the value to be paid by the owner [illegible] less the cost of getting it there, would [illegible] Brother's Case, 35 Pa. 24, [illegible] *Lessee of Hoover* [illegible] ours.)

Og. Ridge Coal Co. v. Rogers, 108 Pa. 147; [illegible] of the Proprietors of Kingston v. Lehigh Valley Coal [illegible] No. 1, 241 Pa. 469; Lytle v. Lytle, 233 Pa. 564; [illegible] of the Proprietors of Kingston v. Lehigh Valley Coal [illegible] No. 2, 241 Pa. 484; Sturdy v. Pennsylvania Coal Co., [illegible] Pa. 597; Hilty v. Swatara Coal Mining Co., 55 Pa. [illegible] 101; Bailey v. Commonwealth, 84 Pa. Super. [illegible] are all actions in trespass for the recovery of damages for the illegal mining of coal belonging to the plaintiff.

Eze v. Kille, 84 Pa. 253 was an action for mesne profits accrued to which title was in dispute.

Stoffey v. Miller, 151 Pa. 230 was an action in trespass for destruction of a crop of ice by reason of the acts of the defendant.

The distinction between those cases and this one is clearly pointed out by the Supreme Court in the case of Trustees of the Proprietors of Kingston v. Lehigh Valley Coal Co. (No. 4), supra, where the Court said, at page 477:

"It is contended for appellant that the proper measure of damages in the present case is compensation to be ascertained by the difference between the market value of the land before and after the trespass as affected by the waste committed. The argument has much force and if the action had been brought to recover damages for a permanent injury to the tract of land in question it would be necessary to hold that this was the correct rule. It was so decided in Noonan v. Parsley, 200 Pa. 474; Rabe v. Schoonberger Coal Co., 211 Pa. 282; Westmoreland & Cambria White Coal Co. 216 Pa. 196, *and this must be considered the settled rule in* [illegible]. In the case at bar the action was brought not for permanent injuries to the land, but for the value of the property thus appropriated. Foster v. Wells, 41 Pa. 261. Just compensation is the rule which is to measure the damages to the complaining party. As applied to the facts of the present case, this means the value of the coal in place, but as to the proper method of determining that value our cases are not in entire harmony." (Underscoring [Italics] ours.)

The plaintiffs also cite Montgomery County v. Schuylkill Bridge Co., 110 Pa. 54; Mifflin Bridge Co. v. Juniata County, 144 Pa. 365; Clarion County Turnpike and Bridge Company v. Clarion County, 172 Pa. 243 and Monongahela Water Company's Case, 223 Pa. 328. Each of those cases involved the value of franchises as well as the physical property taken. The value of such franchises can only be fixed by an examination of the profits which have been derived from such privilege. That, of course, is not this case.

In our opinion, the proper measure of damages, in this case, is the market value of the entire tract before and after the taking, giving effect to the taking and also taking into consideration in fixing the value that there is a deposit of sand and gravel on the land. Market value in this connection has been defined as the price which a purchaser willing but not obliged to buy, would pay an owner, willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied (Vollmer v. Philadelphia, 56 Pa. 223, 228).

It being conceded that there is no evidence in the record as to that fact, it only remains for us to determine whether any such evidence was erroneously excluded.

After the plaintiffs had rested, they moved to reopen their case for the purpose of introducing evidence by Harry Sgarlat, one of the owners as to the value of the property before and after the taking. The trial Judge granted the motion and reopened the case. Harry Sgarlat had already testified that the land had no market value. He explained that what he meant was that no one would pay the price that they were asking or considered adequate. He then testified that the property was worth $382,000.00 before the

taking and that it was worth $90,000.00 after the taking. During the cross-examination of the witness, the trial Judge questioned him as follows:

"Q. Mr. Sgarlat, have you arrived at this figure of $82,000.00 and you took into consideration the sand and gravel in the land?

A. That is true.

Q. And what the sand and gravel was worth separately?

A. Right."

Upon motion of the defendant, the entire testimony of this witness on the question of value was stricken from the record. We think this ruling was proper. From those answers and others given on cross-examination, it is evident that the witness was separating the sand and gravel from the surface. This is an improper measure of damages under the cases above cited. With this testimony out of the record and with the prior testimony of Harry Sgarlat that the land had no market value, the comment of counsel which we quoted at the beginning of this opinion is a correct statement of the condition of the record. There was no evidence upon which the jury could have based a verdict for the plaintiffs.

Plaintiffs now contend that the testimony of Harry Sgarlat should have been permitted to stand because the owner is always competent to testify as to the value of his own land, citing Heacock v. Bethlehem Water Authority, 364 Pa. 408, 413 and Beck v. Pennsylvania, Poughkeepsie and Boston R. R. Co., 148 Pa. 271. That is a correct statement of the law but it has no application to this case. While an owner is permitted to state his opinion as to the

value of his land, he is no more alloyed to use an erroneous method of computing the value than any other witness and that is what Harry Sgarlat did in this case.

The plaintiffs offered in evidence the appraisal reports made to the Commonwealth by its appraisers. They now contend that these reports should have been admitted for the purpose of showing that the land had some value. Not only is this contrary to their present theory but the reports were not offered for that purpose at the trial. They were offered to show that the Commonwealth made no effort to agree with these plaintiffs on the damages as required by the statute. The appraisals become immaterial in view of the testimony that the land has no market value, as land.

There were present in court three real estate experts and a sand and gravel expert who were prepared to testify for the defendant, if necessary. Plaintiffs asked permission to call them as on cross-examination and not be bound by their testimony. The application was refused and we think properly so. The Act of 1887 (28 P. S. 81) which permits such examination provides that there are only certain classes of persons who may be so called, as a party to the record, a person for whose immediate benefit such proceeding is prosecuted or defended, any director or officer of a corporation which is a party to the record, or for the immediate benefit of which such proceeding is prosecuted or defended, or any other person whose interest is adverse to the party calling him as a witness. The witnesses sought to be called by the plaintiffs fall within none of those categories.

We think that the trial Judge decided correctly in directing a verdict for the defendant (see Morris & Essick

Mutual Coal Co. v. Delaware, Lackawanna & Western R. R. Co., 190 Pa. 148; Baird v. Schuylkill River East Side R. R. Co., 154 Pa. 463).

This disposition of the case makes consideration of the plaintiffs' other reasons for a new trial unnecessary.

Accordingly,

Now, this 9th day of April, 1959, at 3 p.m. E. S. T., the rule to show cause why a new trial should not be granted is discharged and judgment is directed to be entered for the defendant on the verdict upon payment of the appropriate fees.

By the Court en Banc,

Apontek

P. J.

Flannery, J. dissenting.

Neville B. Scott, Esq.,

Attorney for the Plaintiffs.

Jacob Schiffman, Esq.,

Attorney for the Defendant.

II.

OPINION OF THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

Nos. 215, 216 January Term, 1959

No. 215—Appeal of Frank B. Sgarlat Sand & Gravel Company, Intervening Plaintiff

No. 216—Appeal of Margretta Sgarlat, Intervening Plaintiff

FRANK B. SGARLAT ESTATE

v.

COMMONWEALTH OF PENNSYLVANIA

Appeals from the Judgment of the Court of Common Pleas of Luzerne County at No. 725 January Term, 1956

OPINION OF THE COURT

Bok, J. Filed: Jan 18, 1960

The case involves the price to be paid by the Commonwealth for condemning part of plaintiff appellant's land.

The Sgarlat family has been in the sand and gravel business in Luzerne County for many years, and in 1932 acquired a tract of land in the Borough of West Wyoming consisting of 33.8 acres. They also have a washing plant a few miles away, at Forty Fort, where sand and gravel from the West Wyoming land is washed and made commercial. The product is of high quality and is in active demand in the area. It appears throughout the West Wyoming tract from surface level to a depth of thirty-five feet or more, and the Sgarlats have been excavating it since 1946.

On September 14, 1955, the Water and Power Resources Board, having entered appellant's land on August 27, 1954, adopted a resolution of condemnation under the basic Act of 1936, First Ex. Sess., August 7, P. L. 107, 32 P. S. 563 et seq., which gave the Board the power of eminent domain.

The land so condemned consisted of three separate bits of the West Wyoming tract: Parcel 23WW-s, 2.826 acres; Parcel 23WW-2C, 1.222 acres; and Parcel 23WW-2F, 0.78 acres; a total of 4.828 acres. The third parcel cannot be excavated, since it is so small that it owes full support to its neighboring owners, and hence it does not concern us. The Board constructed levees on all three parcels as part of the Flood Control program.

The Board's appraisers valued the condemned acreage at $1650.00, which was offered and refused, and a Board of View later awarded $6500. Plaintiff appealed to the Court of Common Pleas, which on trial directed a verdict for the defendant Commonwealth.

This left the record in the odd state of providing no compensation for the taking of appellant's land. The ex-

planation lies in appellant's theory of the case, which was that the property had no market value but was intrinsically worth $382,000 before the taking and $90,000 after. This brace of figures stems from considering the sand and gravel apart from the land, considering the West Wyoming and Forty Fort lands as an inseparable business unit, considering future profits or royalty values, considering the value of the sand and gravel needed to be left in place in order to support the levees, and considering the lack of comparable sales and the uniqueness of the situation. Both counsel stated that they had no testimony of fair market value to submit to the jury. The Court's measure of damage was, according to its considered expression after argument en banc:

> "The market value of the entire tract before and after the taking, giving effect to the taking and also taking into consideration in fixing the value that there is a deposit of sand and gravel on the land . . . the price which a purchaser willing but not obliged to buy would pay an owner willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied (Volunteer v. Philadelphia, 350 Pa. 223, 228)."

See Ward v. Commonwealth, 390 Pa. 526 (1957), 136 A. 2d 309. This resulted in the directed verdict.

The Commonwealth, properly recognizing that it may not constitutionally take land without the just compensation required by Article I, Section 10, of the State Constitution, has agreed that however this appeal is decided it will pay at least the $65001 set by the Board of View.

The Court below was right. The Commonwealth does not condemn an owner's business acumen or its results

expressed in value. It condemns his property, which one man may use exceeding well, another ill, and a third not at all. The use of one's talents is a private, not a public matter. If we own part of the Common earth, we risk having to return it to the common use, and what we may expect to get for it in compensation is the common value. We so admire industry and ingenuity that the obverse of the appellant's picture is easier to see fairly. If his fields contained diamonds and he never raised his hand to take them, he could not expect to be compensated after condemnation for all of his estimated diamonds at Tiffany prices. No more should the owner expect it who does make ado to realize them and sell them: he has done so while he owned them, but when the public needs his land for the general good, he may not hope to be paid thereafter for what he may no longer realize. All he can get is the value of his land as affected by an idea that may appeal to the general or average buyer.

This has always been the policy of our law. In Searle v. Lackawanna & Bloomsburg Railroad Co., 33 Pa. 57 (1859), Chief Justice Lowrie said:

> "Land may have $4000 worth of coal per acre in it, and yet sell at $40 per acre.
>
> "When a man has to sell his property, of course, he must take the market value for it. That is measured by the custom or common dealing of the country. If it is land, the market value is measured by the price usually given for such land in that neighbourhood, making due allowance for differences of position, soil, and improvement. Value may be very approximately estimated in that way, for it is not then founded

upon the mere opinion of witnesses, but on the fact of a general market value.

"When the state takes private property for public uses, or authorizes it to be taken, this market value is all that it pays for it. This is the necessary measure, in order to avoid the favouritism or oppression that would attend any other measure. Every man holds his property subject to this eminent domain, dominion, or ownership of the whole society. He must give it up when society needs it, on being paid its value according to the estimate put on it in the market, that is, by common consent."

This rule has been followed in Reading & Pottsville Railroad Co. v. Balthaser, 119 Pa. 472 (1888), 13 A. 294; Appeal of Henry Fulmer, 128 Pa. 24 (1889), 18 A. 493; Cole v. Ellwood Power Co., 216 Pa. 283 (1907), 65 A. 678. In Cole a distinction was made to allow for the taking of a mineral deposit apart from the land; such a case is Lehigh Coal Co. v. Wilkes-Barre & Eastern Railroad Co., 187 Pa. 145 (1898), 41 A. 37, where the condamnum was a culm bank already mined and piled on the land. It was held to be personalty. But in Balthaser Mr. Justice Green said: "The value of the plaintiff's land as limestone land was a proper subject of consideration . . . in estimating the damages, but not the value of the stone under the road." See also Becker v. Philadelphia & Reading Railroad Co., 177 Pa. 252 (1896), 35 A. 617.

Appellant seeks to treat his two properties as one, citing Cameron v. Pittsburgh & Lake Erie Railroad, 157 Pa. 617 (1893), 27 A. 668, and Morris v. Commonwealth, 367 Pa. 410 (1951), 80 A. 2d 762. These cases involved farm land through which ran, respectively, a canal and a

road, and the properties obviously formed a unit that was damaged as a whole. Contra can be cited Pennsylvania Co. v. Pennsylvania Schuylkill Valley Railroad Co., 151 Pa. 334 (1892), 25 A. 107, and Potts v. Pennsylvania Schuylkill Valley Railroad Co., 119 Pa. 278 (1888), 13 A. 291, where the properties were separated, respectively, by an intervening tract and by a mile or more of distance; these separated bits were held not to form a unit. In the case before us the separation is by three miles or more, and the Forty Fort bit, where the washery is, could be used for other purposes than washing sand and gravel from the West Wyoming tract. The two parcels may form a business unit for the moment, but either could, with some adjustment, go on functioning without the other, and appellant's primary thrust is more at business damage than at land damage.

Nor may he measure his harm by loss of anticipated profits. In Johnson's Petition, 344 Pa. 5 (1942), 23 A. 2d 880, we quoted from Iron City Auto Co. v. Pittsburgh, 253 Pa. 478 (1916), 98 A. 679, where Mr. Justice von Moschzisker gathered all of the pertinent precedents and said: "Under no circumstances can 'profits of business' be claimed in condemnation proceedings."

Counsel for appellant said during the trial: ". . . we cannot show the actual profits in the past that have been made by the Sgarlats out of the West Wyoming tract." Hence, our view is limited to future profits, which have always been held conjectural and speculative. In Laureldale Cemetery Co. v. Reading Co., 303 Pa. 315 (1931), 154 A. 372, Mr. Justice Maxey said, in a case involving a cemetery where there was no evidence of comparable sales:

"Every owner of acreage which is likely to be appropriated under eminent domain will be tempted to designate his land as an airport, a public golf course, an amusement park, a fox farm or a peach orchard, or something else distinctive, and by so using a portion of it give all of it the status claimed. Future values of the entire tract based on anticipated profits would be conjectured, and the present worth of this future value would become the measure of damages for any of the land taken. . . ."

In Chatfield v. Board of Revision of Taxes, 346 Pa. 159 (1943), 29 A. 2d 685, we refused to base damage value upon the future development of a large estate as a community of small homes, and in Cox v. U. & P. Railroad Co., 215 Pa. 506 (1906), 64 A. 729, we allowed the plaintiff to show that his land could be used for raising ducks but not the number of ducks or the profit from them.

We are told that there are no comparable sales, but this does not preclude a show of value. In Philadelphia & Reading Coal & Iron Co. v. Commissioners of Northumberland County, 323 Pa. 185 (1936), 186 A. 105, we held that where there are no recent sales or active market for the kind of property involved, other elements may be considered. These are well set out in Philadelphia & Reading Coal & Iron Co. v. Commissioners of Northumberland County, 229 Pa. 460 (1911), 79 A. 109:

"If, however, there were no sales from which the general selling price might be ascertained, the market value may be established by the testimony of persons acquainted with the property, and whose knowledge and experience qualify them to form an intelligent

judgment as to its proper valuation. In such cases it is proper to adduce evidence upon all matters affecting probable selling price, such as location, condition, improvements, quality of land or coal, and any other element of value that would influence the mind of a purchaser: Pittsburgh, etc., R. R. Co. v. Patterson, 107 Pa. 461; Pittsburgh, etc., Ry. Co. v. Vance, 115 Pa. 325."

The point is that various elements may be mentioned as themselves affecting value, but without giving their specific value in terms of money. Thus, in Butler Water Company's Petition, 338 Pa. 282 (1940), 13 A. 2d 72, we refused to allow the cost of removing facilities as a separate item of damage but allowed the fact to be taken into account in fixing general value: Becker v. Philadelphia & Reading Railroad Co., supra (177 Pa. 252); Philadelphia Ball Club v. Philadelphia, 192 Pa. 632 (1899), 44 A. 265. In Chambers v. South Chester Borough, 140 Pa. 510 (1891), 21 A. 409, we said:

> "Attempts have often been made to introduce particular items of damage . . . such as the cost of fencing, loss of business, expense of altering buildings, the value of minerals under the surface, and many other distinct and independent matters . . . but we have repudiated them all."

In Westinghouse Air Brake Co. v. Pittsburgh, 316 Pa. 372 (1934), 176 A. 13, we said:

> "Estimates as to the costs of rebuilding specific items of property or injury to particular uses affected by the taking, are not recoverable or admissible as distinct items of damage, but such losses may become

useful as elements bearing on the market value before and after the appropriation."

It is the fact of such loss, not its actual statement in dollars that is the permissible element affecting damage. It has been suggested that the royalty value of the ascertained amount of sand and gravel in the ground would provide a ready measure of damage. We disagree, because royalty value is another facet of profits and business accounting.

Finally, it is urged that the owner is competent to testify to the value of his property. In general he is competent, since he has at least a general knowledge of what he owns: Heneken v. Bethlehem Water Authority, 364 Pa. 408 (1950), 72 A. 2d 264. But he is subject to the current rules and occupies no special position as a witness. Appellant is in the position of the witness whose testimony was held incompetent in White v. Pennsylvania Railroad Co., 229 Pa. 480 (1911), 78 A. 1035, where we said:

> "Not only did he repeatedly admit in his preliminary examination that he had no familiarity with the market value of the land in the neighborhood, but when testifying in chief he as repeatedly said that the estimate he gave was not a market value, but a value based on what he thought the farm would produce. When asked how he arrived at the market value, his reply was that he did not believe it right to consider market value; that he had his own notion as to what this land was worth, and was not governed by outside sales; that he estimated it from its earnings capacity, and that he could not confine himself in his estimate to market value. Thus the one standard by which the

law measures damages in cases of this kind was distinctly repudiated by the witness."

The record, in fact, is not barren of effective evidence. Certainly there is no clear evidence that the property has no market value. There is a thick and continuous blanket of sand and gravel under the Wyoming Valley. The witness Banks spoke of a sale of sand and gravel land in the Valley; his company bought its tract of "stone" property. In thirty years this witness operated three sand and gravel enterprises in Luzerne County, and he mentioned one other concern in the business in 1955 besides himself and appellant. Even appellant named two outside the Valley but within a radius of ten miles, and two others in the Valley. He also said that his company has bought another piece of land two miles from the property in suit. There is evidence of some eighty holes bored on the acreage to determine the extent of pay-dirt. Altogether there seems to be ample evidence, even if there is little by way of comparable sales; from which a fact-finder advised by the "custom of common dealing of the country" could establish what value such land has among its neighbors and according to the rules. The figure of the Board of View, $6500, should be adopted as the value, in accordance with the agreement of the parties.

Our view of the case renders irrelevant appellant's subsidiary claims for support and loss of water rights.

The judgment is affirmed.

III.

PETITION FOR REARGUMENT

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

Nos. 215, 216 January Term, 1959

No. 215—Appeal of Frank B. Sgarlat Sand & Gravel Company, Intervening Plaintiff

No. 216—Appeal of Margretta Sgarlat, Intervening Plaintiff

FRANK B. SGARLAT ESTATE

v.

COMMONWEALTH OF PENNSYLVANIA

Appeals from the Judgment of the Court of Common Pleas of Luzerne County at No. 725 January Term, 1956

PETITION FOR REARGUMENT

To the Honorable, the Chief Justice and the Justices of Said Court:

The appellants respectfully submit the following Petition for Reargument under Rule 69.

I. HISTORY OF THE CASE

This is a condemnation proceeding involving a tract of sand and gravel land in the Borough of West Wyoming, Pennsylvania.

In 1954, the United States constructed a levee on the tract under an agreement with the Commonwealth which bound the Commonwealth to pay for the land (see brief pp. 42, 43).

The Commonwealth filed a petition for a Board of View in 1956. The Board of View awarded the appellants damages of $6500.00.

The appellants took an appeal from the above award. At the trial on the appeal, the trial Judge found that there was insufficient evidence in their case to go to the jury and, the Commonwealth having refused to put in its own case, he accordingly directed the jury to return a verdict for the Commonwealth.

Judgment was entered on the verdict on April 14, 1959. The judgment was affirmed by the Supreme Court in an opinion by Justice Box on January 18, 1960. A copy of the opinion is attached hereto.

II. POINTS OVERLOOKED OR MISAPPREHENDED BY THE COURT

The Court recognized the fact that the judgment was unconstitutional because it took the land from the appellants without compensation (p. 2). However, at the af-

gument, the Commonwealth offered to pay the appellants the amount of the award as compensation and the Court accepted this offer as valid and binding on both parties (p. 8). It therefore affirmed the judgment.

The facts relative to the above offer may be briefly stated as follows:

The offer originally appeared in the Commonwealth's brief where it is said (pp. 5-6):

> "Nevertheless, the Commonwealth does not propose to take this land, as it has the legal power to do, without payment. It has offered to pay appellant the amount of the Board of View award for the parcels in issue, a sum which the Commonwealth had earlier decided not to contest by appeal."

It is not clear from this offer whether it was to be good only in the event that it was accepted by the appellants in settlement of the appeal or whether it was to be good in any event. At the argument, however, the offer was further clarified, or expanded, to include payment however the appeal might be decided (Opinion p. 3).

The first notice that the appellants had of the offer was when they were advised by telephone that they were being sent a typewritten copy of the Commonwealth's brief and that the brief contained the offer. This occurred approximately a year after the trial and almost seven months after the judgment was entered. It took place only a few days before the argument, and the appellants had no opportunity to file objections thereto.

At any rate, the offer was never accepted by the appellants. And, it is submitted, the Commonwealth now

expected that it would be accepted. If it had, it would have made a direct offer to appellants instead of an indirect one by way of its brief.

It therefore seems apparent to the appellants that the above offer was not made in good faith by the Commonwealth. The appellants, in their brief, had charged the Commonwealth with having taken their land for nothing, and, as they view the offer, its sole and only purpose was to avoid this charge and thus eliminate prejudice from the minds of the Court.

III. REASONS FOR REARGUMENT

1. It was improper for the Court to consider the offer in reaching its decision.

2. The decision deprives the appellants of their property "without due process of law" and "without just compensation" in violation of the Fifth and Fourteenth Amendments to the Federal Constitution. (See also Article I, Section 10 and Article I, Section 11 of the State Constitution.)

IV. ARGUMENT

As the appellants understand the decision of the Court, it is conceded that the judgment as originally entered was invalid but the Court held that the invalidity had been removed by reason of the Commonwealth's offer. This leaves

the offer standing alone as the sole basis for the decision of the Court.

1. On page 8 of the opinion, the Court states that there was ample evidence in the case to show the value of the land.

In such event it is respectfully submitted that the compensation to be paid appellants should be determined by a jury on the basis of this evidence and not according to the offer of the Commonwealth.

2. If there is fundamental error in a judgment when it is entered, it is somewhat difficult for the appellants to understand how this error can be cured by any later offer of settlement which a party might make during an appeal.

Nevertheless, the Court has disregarded the unconstitutionality of the judgment in this case simply because the Commonwealth has promised to pay them the amount of the award.

This has the effect of substituting the award for a judgment in the case, and it denies the appellants their right of appeal from the award. It also denies them the right to have their damages assessed by a jury.

More than this, however, by basing its decision on a gratuitous and unaccepted offer of settlement made after the record was closed, the Court, in effect, removed the case from the orderly processes of the law and placed it within the control of the Commonwealth. It was the Commonwealth who actually determined the amount of the compensation in this case and not a jury; and the principle of the decision would be the same even if the Com-

monwealth had offered to pay more, or less, than the amount of the award.

The appellants therefore respectfully submit that they are entitled to a new trial. No litigant could ever feel secure in the protection of the law if his vested rights in a new trial could be defeated in this manner. Any appellee-condemnor, who concealed error in the Court below and feared a new trial, could avoid the trial by simply making an offer of settlement on the appeal. Such an offer, of course, would naturally contain his own terms for the settlement. If approved by the Court, as it was in this case, it is submitted that every constitutional right of the appellant-owner would be completely destroyed.

3. A very important question of fact in the instant case is whether the amount of the award is more or less than the fair value of the land as determined by the Commonwealth itself.

This question arises because of the following unique circumstances in the case.

In 1954, the Commonwealth made an appraisal of the land, but the appraisal was based on a mistake. The appraisers did not realize that the land contained valuable deposits of sand and gravel, and they therefore valued the land as though it were wasteland. They put a total value on the parcels, which then consisted of 5,040 acres, of only $1,660,00, or some $332.00 per acre. (See the reports of the appraisals Exh. Nos. 16, 17, 18, 162a-164a.)

This mistake was later admitted by the Commonwealth. It acknowledged that the land should have been valued "the same as coal land in this area" (129a; see also 90a, 91a).

However, the mistake was not immediately corrected by the Commonwealth. Instead, the Commonwealth sent the matter before a Board of View and, before the Board of View, the three appraisers for the Commonwealth testified that the damages of the appellants were still $1,450.00, $1,660.00 and $1,700.00. (Note—The reports of the appraisals were not before the Board. These were obtained by appellants, by rule, after the award.)

It thus appears that the mistake was not corrected before the date of the award and, since the Commonwealth refused to permit the appraisers to testify at the trial (146a, 147a), the appellants have been unable to discover whether it was ever corrected after this date.

This being the state of the record as it stands now, it is respectfully submitted that the appellants are entitled to a new trial.

Under the unusual provisions of the particular statute involved here, the Commonwealth is required to make an appraisal of land and to tender the appraised value to the owner before it enters on the land. The owner may accept the tender without prejudice to his right to apply for a Board of View. He is thus guaranteed a minimum value for his land, even without a trial, with the right to go to trial if he believes he is entitled to receive more (See brief pp. 16, 17).

It goes without saying that any appraisal made under the statute must be made on a fair basis and in good faith by the Commonwealth. The Commonwealth, for example, could not value an improved property as though it were vacant land and, it is submitted, it could not value a sand and gravel pit as though it were waste land.

The appellants therefore had an absolute statutory right that the appraisal aforesaid be corrected before the Commonwealth took their land. This was a property right which entitled them to be tendered the *fair* appraised value of the land even before they went to trial and, of course, they also had the same property right to receive at least this value as a result of the trial.

Consequently, whether or not any such corrected appraisal has yet been made, the appellants contend that the Commonwealth cannot now deprive them of the above rights simply because it might prefer to pay them the amount of the award.

Since it is hardly possible, under the undisputed physical facts of the case, that the value of any such reappraisal could be less than $61,500.00, the appellants, for their part, prefer to receive this value instead of the amount of the award.

4. The decision allows no compensation for the loss of the support or the water rights. It is based on the offer which in turn was restricted to paying compensation for "the parcels in issue". (Commonwealth's brief p. 6).

The Commonwealth so restricted the compensation to be paid because it has always denied liability for the support and water rights. At the trial all evidence as to these items was excluded by the Court on objection of the Commonwealth.

However, the taking of the support was just as much a taking as the taking of the parcels themselves (see brief p. 38). And there can be no doubt but that the water rights were destroyed as a result of the taking (78a, 79a).

Consequently, even though the damages for the loss of the parcels should be restricted to $6,500.00, the appellants claim that they are still entitled to a new trial so that they can recover compensation for the loss of the support and the destruction of their water rights.

5. The appellants have no doubt that the counsel for the Commonwealth had proper authority from the Water and Power Resources Board to make the offer aforesaid, but they do not know whether or not the offer has, or would receive, the approval of the Auditor General who controls the accounts of the Board. It is conceivable that the Auditor General would disapprove payment under the offer if there were no legal compulsion on the Board to make payment.

In this connection, there is nothing in the written offer which implies that a payment would be paid even if the appellants were to lose their appeal. On the contrary, in the offer itself, the Commonwealth expressly reasserted its position that it had the "legal power" to take the land "without payment."

This being the case, the Auditor General could very easily construe the offer as one of compromise only, i.e., not as an offer which was good even though the appellants should lose their appeal but solely as an offer of settlement which was good only if it was accepted by the appellants before they lost the appeal.

At any rate, it is clear that, not having accepted the offer, the appellants have no agreement which could be used as the basis for a suit against the Commonwealth. Neither do they have any judgment which can be enforced against the Commonwealth. They, therefore, have no legal

means by which they could collect payment under the offer. By the same token there is no authority for the Auditor General to approve payment. He could hardly approve payment in a matter in which an unconditional judgment has already been affirmed in favor of the Commonwealth.

Unless they are given a legal means of collecting compensation for their land, the appellants respectfully submit that the instant record must still be viewed as though the Commonwealth had taken the land without compensation.

6. The local and federal questions raised in this petition were not raised in the Court below because the appellants had no means of knowing, in the Court below, that any offer was to be made in the future by the Commonwealth.

And the questions were not presented to the Court at the argument because the appellants had no means of knowing before the argument that the Court would base its decision on the offer. Moreover, notice of the offer was not given to the appellants in time to prepare the questions for the argument.

As a result, at the argument, the Court had nothing before it but the bare fact of the offer. None of the questions which have arisen in the case as a result of the offer were presented to the Court by brief or oral argument of either party.

It is therefore respectfully submitted that a reargument should be granted. Otherwise, the appellants will be denied the opportunity of ever arguing the very point upon which the decision is based.

V. CONCLUSION

The award of the Board, and therefore the decision of the Court, does not represent just compensation in this case.

Assuming arguendo that the award was not based on error or caprice, the Board still did not have before it the same evidence, or quality of evidence, as the appellants were prepared to produce at the trial. Neither did it have the benefit of any corrected appraisal of the land by the Commonwealth.

Hence, it is respectfully submitted that a new trial should be granted. The appellants should be entitled to recover at least the fair value of the land as determined by the Commonwealth itself.

In the event that the appraisal of $1,650,000 was never corrected, a new trial should be granted because the Commonwealth itself does not put any faith or trust in this appraisal. Otherwise, it would not now be willing to pay $6,500,000, or four times its amount, in order to avoid a new trial.

On the other hand, in the event that the appraisal had been corrected, a new trial should be granted because the Commonwealth had no right to suppress evidence of its amount at the trial.

WHEREFORE, the appellants respectfully request the Court to grant them a reargument.

Respectfully submitted,

Neville B. Shea

Attorney for Appellants

Petition for Reargument

Commonwealth of Pennsylvania
County of Luzerne ss:

Neville B. Shea, Esq., being duly sworn according to law, deposes and says that he takes this affidavit on behalf of the appellants in the above entitled matter, that the within Petition is not filed for purposes of delay, and that the facts set forth therein are true and correct.

Neville B. Shea

Sworn to and subscribed before me this 26 day of January, 1960.

Marjorie Sams
Notary Public

My commission expires:

IV.

ANSWER TO PETITION

COPY

January 28, 1960

Charles H. McKibben, Prothonotary
Supreme Court of Pennsylvania
City Hall
Philadelphia 7, Pennsylvania

In Re: Frank B. Sgarlat Estate v. Commonwealth of Pennsylvania Appeals of Frank B. Sgarlat Sand and Gravel Co. and Margrette Sgarlat, Intervening Plaintiffs Nos. 215 and 216, January Term, 1959

Dear Mr. McKibben:

Confirming a telephone conversation of this date with Mr. McGarrity, the Commonwealth will not file an answer to Appellant's Petition for Reargument in this matter.

The Commonwealth, however, does not by this action acquiesce in Appellant's motion but, rather, urges the Court to dismiss it as nothing is raised therein which was not fully covered by the Opinion of the Court.

Very truly yours,
Morris J. Dean
Deputy Attorney General

cc: Jacob Schiffman
Second National Bank Building
Wilkes-Barre, Pennsylvania

V.

DENIAL OF PETITION FOR REARGUMENT

(Endorsed on the Petition)

March 17, 1960. Petition denied. Per curiam.

VI.

STATUTES

A. UNITED STATES

The relevant portions of the Act of June 25, 1948, C. 646, 62 Stat. 963, 28 U. S. C. A. 2106 provide as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand for the cause and direct the entry of such appropriate judgment, decree, order, or require such further proceedings to be had as may be just under the circumstances.

B. PENNSYLVANIA

1. The relevant portions of the Constitution of Pennsylvania provide as follows:

Statutes

Article I, Section 10 . . . No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law *and* without just compensation being first made or secured.

Article 16, Section 8. Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements, which compensation shall be paid or secured before such taking, injury or destruction. The General Assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporations or individuals made by viewers or otherwise; *and the amount of such damages in all cases of appeal shall on the demand of either party be determined by a jury according to the course of the common law.* (Italics supplied.)

2. The relevant portions of Sections 11 and 12 of the Act of 1936, Ex. Sess. Aug. 7, P. L. 106, No. 46, as amended by Section 1 of the Act of 1937, March 10, P. L. 43, 32 Penna. Statutes Annotated 663, 664, provide as follows:

Section 11. The board shall have power to acquire any property, easements, rights of way, and water course deemed necessary for the construction of any of its public works or improvements provided for in this act by the right of eminent domain, and shall have power to enter upon, injure or destroy any such property deemed necessary for such purposes. *The*

proceedings for the condemnation of property and for the assessment of damages for property taken, injured or destroyed shall be in accordance with the act, approved the fifteenth day of July, one thousand nine hundred and nineteen (Pamphlet Laws, nine hundred seventy-six), entitled "An act to authorize the Board of Commissioners of Public Grounds and Buildings to acquire property for the Commonwealth by proceedings in eminent domain, where the purchase of such property has either been authorized by law or determined by the Board of Commissioners of Public Grounds and Buildings under existing laws, and an appropriation made therefor," and its amendments and supplements, *except that the board may take possession of the property upon tendering the value of the property taken as determined by the board's appraisers*: Provided, That any property owner, who believes the amount tendered insufficient to fully compensate him, may accept the same under protest and without prejudice to his right to apply for the appointment of a Board of View to assess the damages claimed: And provided further, That if the award of the Board of View is not greater than the amount previously tendered and accepted, then all costs of the proceeding shall be imposed on such claimant. If the award if greater than the amount tendered and paid by the board, the claimant shall be entitled to costs, and the board shall pay, in addition thereto, the difference between the amount awarded and tendered. Nothing herein contained, however, shall deprive either the board or the claimant from appealing from or filing exceptions to the report of the Board of View, but upon trial of any appeal, if the party appealing does

not obtain a verdict more favorable than was the report of the Board of View, he shall not recover costs. . . . (Italics supplied.)

Section 12. All lands, rights of way, and water courses acquired under the authority of this act for State or Federal flood control works and improvements, *shall be acquired without cost to the United States*, and no moneys made available for flood control in this Commonwealth, by the United States, shall be used for such purposes unless in either event the Government of the United States, or any of its agencies or instrumentalities, shall first consent thereto, *nor shall the Government of the United States be deemed liable for any damages*, by reason of its contribution, arising in connection with the construction of any State or Federal public works or improvements. . . . (Italics supplied.)

3. The relevant portions of Section 5 of the Act of 1919, July 15, P. L. 976, and of Section 7 of the Act of 1919, July 15, P. L. 976, as amended by Section 3 of the Act of 1929, April 25, P. L. 710, 71 Penna. Statutes Annotated 1575, 1577, provide as follows:

Section 5. Any owner or other party in interest aggrieved by the report of the viewers may file exceptions raising questions of law or may appeal from the said award. In the event that exceptions are filed which affect the validity of the proceedings, such exceptions shall be first heard and determined before any issue is framed upon an appeal. In the event that an appeal is taken but no exceptions are filed, *an issue shall be framed, as now provided by law for the trial*

ing of issues to try the amount of damages in taking of property in the proceedings in eminent domain by municipalities, for the purpose of trying the amount of the compensation, damages, or benefits, and no other question shall be tried upon said appeal. (Italics supplied.)

* * * * * * * * *

Section 7. The Department of Property and Supplies shall have the right *upon the filing of any report of viewers*, to enter upon and take possession of the property to be acquired without the filing of any bond or other security, where an appropriation has been made for the purchase or the condemnation of such property. (Italics supplied.)

Note—This provision has been construed to mean that the State may not lawfully enter upon land under this Act until a report of viewers has been filed. (*Reinhold v. Commonwealth*, 319 Pa. 33, 179 At. 571.)